

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1710

Cir. Ct. No. 2014CV51

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RONALD L. DASSOW AND SHARON L. DASSOW,

PLAINTIFFS-APPELLANTS,

V.

DWAYNE W. HAMANN AND SHEILA A. HAMANN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Taylor County:
ANN KNOX-BAUER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Ronald and Sharon Dassow appeal from a judgment awarding them compensatory damages and taxable costs in a nuisance

case stemming from their being blocked access to certain real property. The Dassows argue the circuit court erred by denying them exemplary damages and costs of investigation and litigation for damage to property under WIS. STAT. §§ 943.01 and 895.446 (2015-16).¹ The Dassows also argue the court erroneously failed to award them monetary sanctions for the defendants' failure to admit a discovery request under WIS. STAT. § 804.12(3). We affirm.

BACKGROUND

¶2 In their complaints in this lawsuit, the Dassows alleged that Dwayne and Sheila Hamann barricaded a town road known as Hunters Drive that traversed the Hamanns' property, thereby denying vehicular access to the Dassows' recreational real estate. The barricade consisted of horizontal and vertical cedar posts placed into the rudimentary logging-type road, and the Dassows alleged the barricade constituted a nuisance that caused property damage under WIS. STAT. § 943.01(2). In the alternative, the Dassows claimed a prescriptive easement over the blocked area of the roadway to the extent it continued past the official end of the town road. The Hamanns filed an answer and affirmative defenses, contending the Town of Greenwood (the Town) had relocated and abandoned part of Hunters Drive, and the Hamanns consequently did not believe the barricade was placed on a town road or across any easement.

¶3 Within one week of the Hamanns filing their answer and affirmative defenses, the Dassows served requests to admit upon the Hamanns. The responses categorically denied most of the requests, including that Hunters Drive was a town

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

road extending through the Hamanns' property. Several months later, the Hamanns engaged new counsel. The Hamanns then advised they would stipulate that a prescriptive easement existed over that part of the roadway located on their property, but that the issue of where Hunters Drive continued as a town road was incapable of resolution without the Town being included as a necessary party to the action. The Dassows nevertheless sought summary judgment, which the circuit court denied because of the Dassows' failure to join the Town as a necessary party.

¶4 The Dassows obtained leave to amend their complaint, and, as relevant to this appeal, they added the Town to the lawsuit. The Dassows then filed a second motion for summary judgment. The Town chose not to contest the motion, and the Hamanns also did not file affidavits or other materials in opposition to the motion. The circuit court granted partial summary judgment, determining that Hunters Drive was a town road extending past the blockage and through the Hamanns' property.

¶5 Following a trial on damages, the circuit court awarded the Dassows \$1,520 in compensatory damages due to the Hamanns' nuisance as well as over \$1,000 in court costs. The court denied an award of exemplary damages or costs of investigation and litigation for damage to property under WIS. STAT. §§ 943.01 and 895.446. The court also denied the Dassows' request for attorney fees caused by the Hamanns failing to admit that Hunters Drive was a town road continuing through the Hamanns' property. The Dassows now appeal.

DISCUSSION

¶6 The Dassows first argue the circuit court erred by denying their motion to sanction the Hamanns for improperly refusing to admit that Hunters

Drive was a town road that extended past the barricade. The motion was based on WIS. STAT. § 804.12(3), which provides in relevant part:

(3) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit ... the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves ... the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

¶7 If a circuit court applying this statute finds that the prerequisites of WIS. STAT. 804.12(3) are met, and that none of the exceptions listed in the statute are present, the court is required to award expenses upon the motion of the party requesting the admissions. *See Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 148, 502 N.W.2d 918 (Ct. App. 1993). On review, we are required to uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* Whether these facts require an award of attorney fees and costs is a question that we review independently. *Id.*

¶8 Here, the circuit court denied sanctions because the discovery requests were of no substantial importance, and also because there were other good reasons for the failure to admit. As the court noted, the Dassows requested three forms of relief in their initial complaint: (1) a declaratory judgment that Hunters Drive was a town road; (2) a declaration of prescriptive easement; and (3) compensatory damages caused by the blockage. The Hamanns admitted in their answer to the complaint that Hunters Drive was a town road, but they denied that it traversed their property past the point of the blockage. However, the

Hamanns later stipulated to a prescriptive easement for the benefit of the Dassows prior to the Dassows filing their initial motion for summary judgment.

¶9 In addition, the Dassows' initial motion for summary judgment was filed prior to the inclusion of the Town, which was a necessary party to the litigation. This omission resulted in an amendment of the pleadings, and, at that point, the Town, in its answer, denied the allegations regarding the town road. Accordingly, to the extent the Dassows were to prevail on whether the town road extended past the barricade they needed to prove the issue vis-à-vis the Town. The Town eventually conceded the Dassows' position regarding the extent of the town road by failing to contest it, and the Dassows prevailed on a second summary judgment motion. The event of substantial importance was the Town's concession, not the Hamanns' failure to admit the requests for admission. Even had the Hamanns admitted the requests, no declaration regarding the location or length of the town road could have been issued without the Town first having the ability to contest those matters.

¶10 The circuit court also observed that the denials of the requests to admit were not unreasonable because the requests were served very early in the lawsuit, and the nature of the requests was such that the Hamanns were not in possession of the requisite information to admit or deny those discovery requests. The court found that while the Hamanns' attorney "could have explained his denials more completely, the court cannot say that his failure to do so was so unreasonable and egregious so as to justify the award of expenses under Wis. Stat. section 804.12(3)." The court also correctly noted that "certain of the admissions called for legal conclusions, not conclusions of fact." As such, there was "other good reason" not to impose sanctions. Based on all these findings, we conclude the court properly reached its determination to deny sanctions under § 804.12(3).

¶11 The Dassows also argue the circuit court improperly denied their civil claim for damages to the road under WIS. STAT. § 943.01, thus depriving them of actual damages related to property, investigation and litigation expenses, and treble damages under WIS. STAT. § 895.446. Because the Dassows' claim arises under § 895.446, the Dassows were required to prove by a preponderance of the evidence that the Hamanns intentionally violated § 943.01, and that the Dassows suffered damages or loss by reason of the Hamanns' intentional failure to comply with § 943.01. *See* WIS. STAT. § 895.446(1).

¶12 The circuit court found there was a failure of proof concerning damage to the town road, which failure precluded treble damages and other investigation and litigation costs under WIS. STAT. §§ 943.01 and 895.446. The court stated as follows:

If you look at the pictures of this road, it's kind of a rudimentary logging type of road, even though part of it is a town road, and the Court declared that it had been. But looking at those photos of the road, including the barricade photos that were presented by the plaintiff at the damages trial and showing what the condition of this road was, I'm not satisfied that there would be sufficient evidence to rise to the level required under 943.01 that there was actually damage committed to this road when the defendant, Mr. Hamann put the posts in, or this barricade, into the road.

It might be a different situation if there was evidence presented showing, like, for instance, that the town had to go out to the road and fix something, like fill in dirt or gravel or asphalt, repair asphalt, or that kind of thing, but there was no evidence of that and I don't think that rises to the level of the violation contemplated by the statute that would justify the imposition of the treble damages and actual attorney's fees.

¶13 The circuit court's ruling was also based on its factual finding regarding causation. Causation is a question of fact, and we will not overturn a

circuit court's findings as to causation unless they are clearly erroneous. *See WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 459, 555 N.W.2d 140 (Ct. App. 1996). The court found there was a failure of proof that damage to the road resulting from the barricade caused the Dassows any damages or loss. The court found the Dassows' injuries were "more in the nature of what's been determined previously by the Court that basically the defendant's establishment of a barricade constituted a private nuisance"

¶14 The circuit court's factual findings are not clearly erroneous. At the trial on damages, Dwayne Hamann identified photographs of the log barricade he placed across Hunters Drive. To erect the barricade, he "dug holes in the [rudimentary logging-type] road" with a shovel. Hamann further testified he ultimately took down the barricade. As the circuit court correctly observed, there was no proof presented at trial "that there was actually damage committed to this road when the defendant, Mr. Hamann put the posts in, or this barricade, into the road."

¶15 Moreover, even if we could somehow assume the holes Dwayne Hamann dug to erect the barricade caused some kind of damage to the road, there was no evidence that the Dassows, as opposed to the Town, suffered any damage or loss caused by the holes.² Such damage or loss is required under WIS. STAT. § 895.446. Quite simply, the record supports the circuit court's finding that the establishment of the barricade only caused an interference with the Dassows' enjoyment of their land—conduct which constituted a private nuisance—for which the Dassows were awarded compensatory damages and statutory costs.

² The Dassows testified at trial they could access their property in a different manner.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

